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In The

Supreme Court of the United States

DONALD RUMSFELD,
Petitioner,
v.

JOSE PADILLA AND DONNA NEWMAN,
AS NEXT FRIEND FOR JOSE PADILLA,
Respondent,

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF *AMICUS CURIAE* OF COMPARATIVE LAW SCHOLARS AND EXPERTS ON THE LAWS OF THE UNITED KINGDOM AND ISRAEL IN SUPPORT OF RESPONDENT

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[1] Pursuant to Supreme Court Rule 37, *amici* state that counsel for a party did not author this brief in whole or in part; that no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief; and that the parties' written consents to the filing of this brief have been filed with the Court.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Both terrorism and democratic values transcend borders. Democratic allies of the United States also face threats of terrorism. Some, notably the United Kingdom and Israel, have long histories of fighting terrorism. This brief documents how dramatically the indefinite, incommunicado detention to which Petitioner has subjected Jose Padilla departs from the minimum procedural protections that other democracies provide detained suspected terrorists. Each of these democratic allies uses four controls to constrain executive authority to detain suspected terrorists: (1) legislation regulating detention; (2) time constraints; (3) access to counsel; and (4) meaningful judicial review. Petitioner seeks license from this Court to dispense with all four limits.

For nearly 21 months Petitioner held Jose Padilla, a citizen of the United States apprehended on U.S. soil, in incommunicado detention. When Petitioner eventually permitted Padilla to meet with his lawyers, he did so, he insists, as a matter of discretion, not due process. Press Release, Department of Defense, Padilla Allowed Access to Lawyer (Feb. 11, 2004), *at* http://www.dod.gov/releases/2004/nv20040211-0341.html. Petitioner continues to detain Padilla indefinitely, without charge, and without a meaningful opportunity to respond.

Petitioner's indefinite, incommunicado detention of Padilla violates the basic standards of due process and human rights that leading democracies accept. This brief, filed on behalf of an international group of comparative law scholars and experts on the laws of the United Kingdom and Israel, shows that the unrestrained power that the Executive

here seeks to exercise against a United States citizen – and seeks to justify by labeling Padilla an "enemy combatant" – has been rejected by democratic allies of the United States as incompatible with fundamental rights.[2] Two democratic allies with long experience fighting terrorism, the United Kingdom and Israel, have rejected incommunicado, indefinite detention as a tool in the war on terrorism. Moreover, the United States Department of State has condemned the use of such tools by authoritarian regimes as violations of basic human rights.

ARGUMENT

I. THE LAW, PRACTICE, AND EXPERIENCE OF OTHER DEMOCRACIES CAN USEFULLY INFORM THE JUDGMENT OF THE COURT

The laws and policies of other democracies, particularly those experienced in fighting terrorism, provide useful points of comparison that may properly inform this Court's deliberations. Since the founding of this country, this Court has addressed in a variety of contexts the relevance of international opinion and practice in interpreting U.S. law.

In supporting one of the Court's historic early rulings, Chief Justice Marshall invoked the "assent of mankind" as one persuasive indicator of the soundness of the Court's constitutional interpretation. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). In a case addressing the constitutional limits to the Executive's power in time of war,

[2] Although many democratic states are allies of the United States and although many provide similar procedural protections, we focus on the practices of close allies Australia, Canada, France, Germany, Israel, Spain, and the United Kingdom, which are referred to collectively in this brief as "democratic allies of the United States." Unless otherwise noted, references to Israel are to detention within the State of Israel. Detention in the West Bank and Gaza is subject to international humanitarian law and military law and will be discussed in Section II.B, *infra*.

this Court looked to precedents in English, as well as U.S., history, finding that "martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject." *Ex Parte Milligan*, 72 U.S. 2, 128 (1866). In deciding the constitutionality of imposing the death penalty on defendants with mental retardation, the Court considered "the views of . . . 'other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community.'" *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2003) (confirming plurality opinion in *Thompson v. Oklahoma*, 487 U.S. 815, 830, 831, n.31 (1988) ("We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual") (plurality opinion)). And in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), the Court considered whether practices have "been accepted as an integral part of human freedom in many other countries," and have "been rejected elsewhere." *Id.* at 2483.

Although international precedents are not binding on U.S. courts, this Court has been willing to look to foreign practice for at least three reasons. First, the law of nations and international legal standards can be relevant to understanding the original intent of the drafters of the U.S. Constitution (particularly those provisions of the U.S. Constitution and other founding documents that were drafted in light of, or were intended to be compatible with, international legal standards).[3] Not only did the Declaration

[3] The founders also looked abroad for a proper understanding of the federal system. *See The Federalist No. 82*, ¶ 5 (Alexander Hamilton) ("The judiciary power of every government looks beyond its own local or municipal laws," so that a proper understanding of state court jurisdiction in a federal system is informed by "consider[ing] the State governments and the national governments . . . *in the light of kindred systems.*") (emphasis added).

of Independence seek to exhibit "a decent respect to the opinions of mankind," but Thomas Jefferson said the law of nations is "an integral part . . . of the laws of the land." Letter from Thomas Jefferson, Secretary of State, to M. Genet, French Minister (June 5, 1793), quoted in 1 John B. Moore, Digest of International Law 10 (1906). The Constitution itself declares that international treaties are the "supreme law of the land," and this Court ruled in an early landmark decision that laws adopted by the United States "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). As John Jay wrote in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793), by taking a place among the nations of the earth, "the United States had . . . become amenable to the law of nations." *Id.* at 474.[4]

Second, international jurisprudence and legal norms are relevant because, in the words of Justice Breyer, the "experience [of other nations] may . . . cast an *empirical light* on the consequences of different solutions to a common legal problem." *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (emphasis added). A decade earlier, Justice Brennan noted that this empirical perspective is particularly useful when striking the balance between civil liberties and national security: "Prolonged and sustained exposure to the asserted security claims may be the only way in which a country can gain . . . the expertise necessary to distinguish the bona fide from the bogus. . . . [I]t may well

[4] *See also Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); 1 Op. Att'y Gen. 26, 27 (1792) (opinion of Attorney General Randolph) ("The law of nations, although not specially adopted by the constitution, or any municipal act, is essentially a part of the law of the land.").

be Israel, not the United States, that provides the best hope for building a jurisprudence that can protect civil liberties against the demands of national security." Justice William J. Brennan, Jr., The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises, 18 Isr. Y.B. Hum. Rts. 11, 18-20 (1988). Other countries' experiences can thus provide important data to help this Court evaluate Petitioner's assertion that disregard of procedural safeguards is necessary to combat terrorism effectively. Particularly since the United States shares concepts of separation of powers and due process with other democratic societies, "there is much to be learned from . . . distinguished jurists [in other places] who have given thought to the difficult issues we face here." Justice O'Connor, Remarks at the Southern Center for International Studies (Oct. 28, 2003), *at* http://www.southerncenter.org/OConnor_transcript.pdf.

Third, international legal norms are relevant reference points because decisions of this Court play such an important role in shaping those norms. As a leading global proponent of the rule of law and fundamental human rights, the United States sets both a standard and an example within the community of nations. Just as the U.S. Department of State is viewed as an important evaluator of the human rights practices of other nations, *See* Section III, *infra*, this Court is looked to as a leading authority on human rights standards worldwide. A Supreme Court decision that places the United States apart from the community of nations by departing from international norms can affect the evolution of law throughout the world. *See infra* Section III. The effects of decisions by this Court on international jurisprudence are a useful lens through which to view the implications such decisions have for countries that share the values that define U.S. society.

In addition to language found in early decisions of this Court, comments by current members of the Court reflect this recognition of the value of considering international

norms. Chief Justice Rehnquist has observed that "now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." William Rehnquist, Constitutional Court-Comparative Remarks (1989), reprinted in *Germany and Its Basic Law: Past, Present, and Future – A German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

Other Justices have commented similarly. Justice O'Connor: "No institution of government can afford now to ignore the rest of the world," noting that conclusions reached by other countries, "[a]lthough ... rarely binding upon our decisions in U.S. courts, should at times constitute persuasive authority in American courts." Sandra Day O'Connor, Keynote address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), *in* 96 Am. Soc'y Int'l L. Proc. 348, 349-50 (2002). Justice Breyer: "[W]e find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison," adding that "[a]nalogous developments internationally ... tend similarly to produce cross-country results that resemble each other more and more, exhibiting common, if not universal, principles in a variety of legal areas." Stephen Breyer, Keynote Address before the 97th Annual Meeting of the American Society of International Law (April 4, 2003), in 97 Am. Soc'y Int'l L. Proc. 265, 266, 267 (2003). Justice Ginsburg: "[C]omparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights." Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999).

Accordingly, Section II.A of this brief surveys the detention practices of principal democratic allies of the United States, including Australia, Canada, France, Israel,

Germany, Spain, and the United Kingdom. Section II.B focuses in particular on the United Kingdom and Israel, two close allies that have had long experience dealing with the violence of terrorism. This summary shows the ways in which the detention of suspected terrorists is (a) based on specific legislative authority, (b) time constrained, (c) conditioned on access to counsel, and (d) subject to judicial review. If this Court were to approve the indefinite incommunicado detention urged by Petitioner, it would make the United States an anomaly among its leading democratic allies.

Section III identifies authoritarian regimes that have adopted the practices at issue here and notes that the U.S. Department of State has criticized these regimes for using the same detention practices that the Executive has deployed against Padilla.

A decision by this Court that the Executive has inherent, unfettered power to detain a U.S. citizen indefinitely and incommunicado would not only place the United States at odds with its democratic allies, but would also leave it in the company of nations whose practices the United States has consistently condemned.

II. OTHER DEMOCRACIES USE DETENTION TO FIGHT TERRORISM WITHOUT SACRIFICING CHECKS AND BALANCES OR FUNDAMENTAL DUE PROCESS

Even when faced with terrorism, democratic allies of the United States have declined to adopt detention practices that disregard fundamental civil liberties.

A. Australia, Canada, France, Germany, Israel, Spain, and the United Kingdom all use detention to fight terrorism while retaining legislative oversight, time constraints on detention, assistance of counsel, and meaningful judicial review

Legislative Authorization. The laws governing our allies' detention of suspected terrorists are authorized and regulated by specific and detailed legislation. This requirement of a legislative mandate provides a check on the otherwise unfettered power of the Executive. In each country, explicit statutory provisions explicitly authorize the detention of suspected terrorists for interrogation while according them certain basic procedural safeguards and protections, including time constraints on detention, access to counsel, and meaningful judicial review.[5]

Time constraints on detention. Democratic allies have set time limits on how long suspects may be detained before

[5] Australian Security Intelligence Organisation Act 1979, No. 113 (1979) (Austl.), *amended to include anti-terrorism provisions by* Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003, No. 77 (2003), amend. 24 (Austl.); Criminal Code, R.S.C. 1985, c. C-46 §§ 83.29(3), 83.3(6)-(8) (Can.), *at* http://laws.justice.gc.ed/C-46/40997.html, *amended by* Anti-Terrorism Act 2001, Ch. 41 (Can.); C. PR. PÉN., arts. 63, 63-4, 706-73, 706-88 (Fr.), *last modified by* Law No. 2004-204 of Mar. 9, 2004, J.O. Mar. 10, p. 4567; Criminal Procedure Code §§ 112 *et seq.* StPO (F.R.G.); Emergency Powers (Detention) Law, 1979, 33 L.S.I. 89 (1978-79) (Isr.), and Incarceration of Unlawful Combatants Law, 2002 (Isr.), *at* www.justice.gov.il/NR/rdonlyres/8459847C-84FD-956D-0F2CB10C948A/0/IncarcerationLaw L.438/01; Constitución Española [C.E.] art. 17 (Spain); L.E. CRIM. arts. 384, 489, *et seq., last modified by* Law on Management of the State (B.O.E., 2003, 41842); Terrorism Act, 2000, c.11, ¶ 41, sched. 8 (Eng.), and Anti-Terrorism, Crime and Security Act, 2001, c. 24, pt. 4 (Eng.). Hereinafter *amici* refer this Court to the Appendix for further elaboration of the statutory provisions authorizing detention of suspected terrorists by the democratic allies of the United States.

that detention is subject to meaningful judicial review. Most legislation cited here sets an absolute limit on the length of time a suspect may be detained without charge. Israel limits the length of any detention order but not the number of times an order may be renewed. Instead, it provides for judicial scrutiny and review of renewal requests. *See infra* pages 23-25. In no case does the legislation of democratic allies permit indefinite detention of the type that Petitioner here asserts the right to use.[6]

Access to counsel. Another central element of the detention policies of the democratic allies is access to counsel.[7] Each of these countries provides for access to a lawyer soon after detention begins. In most instances, access to counsel is provided within hours; in no instances is the right to counsel denied for more than a few days.[8] And even where the right to counsel can be delayed for a few days, the delay must be authorized through established procedures that are subject to review.[9]

Judicial review. Finally, continuing judicial review of the necessity and legality of detention is a feature common to the legislative frameworks of other democracies dealing with threats of terrorism. Some require judicial approval prior to the arrest of suspects. Others provide specific time periods before which detainees must be brought before a judge.[10] And although some countries provide that detention may be extended for investigative or preventive reasons, they subject such extensions to judicial review, and suspects have the opportunity to challenge continued detention before an independent judicial authority. Moreover, the examples of

[6] *See* sources cited *infra* Appx.

[7] *See* sources cited *infra* Appx.

[8] *See* sources cited *infra* Appx.

[9] *See* sources cited *infra* Appx.

[10] *See* sources cited *infra* Appx.

the United Kingdom and Israel show that judicial review may be available not only to enforce explicit statutory rights but also to guarantee fundamental due process limits on detention.[11]

In the section that follows, we examine in greater detail the experiences of the United Kingdom and that of Israel. Both countries share U.S. democratic values and have significant histories and extensive experience in dealing with the continuing threat and recurring reality of terrorism.

B. The United Kingdom and Israel, with long experience fighting terrorism, guarantee fundamental due process rights to suspected terrorists

In considering Petitioner's claim of inherent constitutional authority to detain citizens suspected of terrorism indefinitely and incommunicado, the experiences of the United Kingdom and Israel are particularly instructive. These democratic allies of the United States have been fighting terrorism for decades, and both detain suspected terrorists.

The United Kingdom and Israel have quite different systems of detention. In the United Kingdom, suspected terrorists may be detained by police during the course of criminal investigations. Certain foreign nationals may also be detained by immigration authorities. In Israel, suspected terrorists may be subject to administrative detention. In the West Bank and Gaza, suspects may also be detained by the military during military operations. Notwithstanding these

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[11] *See* pp. 13, 23-26, *infra*. The International Covenant on Civil and Political Rights, art. 9, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 and the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5, Nov. 4, 1950, 213 U.N.T.S. 221, also mandate timely judicial review of the detention of suspects."

differences, each of these systems shares a recognition of basic due process rights.

1. The United Kingdom

The United Kingdom has confronted terrorist activity on a large scale since "the Troubles" began in Northern Ireland in the late 1960s.[12] Arriving in Northern Ireland in 1970 in the wake of armed conflict between Protestant Loyalists and the Irish Republican Army, the U.K. Army faced continual acts of terrorism. During the first seven months of 1971 there were 304 bomb blasts, killing thirty-one people, and in December 1971, a car bomb in Belfast killed fifteen Catholics. From August 1971 to March 1972, when the Parliament assumed direct rule over Northern Ireland, there were 1,130 explosions, 2,000 shootings, and 233 deaths, including 158 civilians. On July 21, 1972, "Bloody Friday," twenty bombs exploded in Belfast, killing eleven and seriously wounding more than 100.

Terrorism was also a constant and deadly presence in England. In October 1974, the bombing of a Guildford pub killed five and injured fifty-four. In November, two more pubs were bombed in Birmingham, killing twenty-one and injuring 184. In 1979, a British Member of Parliament was assassinated, killed by a car bomb within steps of the House of Commons. In July 1982, an attack on a U.K. army unit participating in a London parade killed eleven and wounded thirty. The following December a car bomb outside Harrod's department store killed six and seriously injured ninety-three. Over the twenty-year period ending in 1990, in Northern Ireland alone more than 2,750 people were killed (2,000 of them civilians) and more than 31,900 were seriously injured. This occurred in a territory with a

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[12] The following historical account is adapted from Stephen J. Schulhofer, *Checks and Balances in Wartime*, 102 Mich. L.Rev. 1501, 1517-19 (2004). *See also, Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25, ¶¶ 81-84 (1978).

population of only 1.5 million – about the same as the current population of Philadelphia.[13]

The United Kingdom's legal structure evolved and was refined over a long period. After initially relying on the Special Powers Act of 1922, which authorized detention (including, in certain circumstances, indefinite detention), the Parliament began in 1972 to regularize and limit the government's authority to detain suspected terrorists.[14] In November 1974, the United Kingdom Parliament enacted the Prevention of Terrorism (Temporary Provisions) Act ("PTA"). Temporary legislation that was regularly renewed for decades, the PTA created new governmental powers to detain and interrogate suspected terrorists. In keeping with U.K. criminal law, the PTA required "reasonable grounds" for arrest and imposed a forty-eight hour limit on detention. It also provided for extension of detention in order to allow for additional interrogation, but such extensions required authorization by a cabinet-level official and were limited to a maximum of an additional five days. Detainees were

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[13] *See Fox, Campbell & Hartley v. United Kingdom*, 13 Eur. H.R.Rep. 157, ¶ 15 (1991). During the mid-1980s, a series of temporary truces reduced the fatality rate, but terrorism persisted on a wide scale until the early 1990s. In the context of peace negotiations, the IRA announced an end to its military operations in August 1994, U.K. army patrols were reduced or suspended, and in April 1998 the Good Friday Accords began an era of relative peace. Even then, terrorist actions by splinter groups continued. In July 1998, a Loyalist bomb killed three children in their home, and a month later a dissident faction of the IRA detonated a car bomb in a small town, killing twenty-nine and injuring over 200. Marie-Therese Fay, Mike Morrissey & Marie Smyth, Northern Ireland's Troubles: The Human Costs 43-49 (1999).

[14] The Civil Authorities (Special Powers) Act (Northern Ireland) 1922 was repealed in 1973 by the Northern Ireland (Emergency Provisions) Act 1996 (EPA). Like the PTA, the EPA was repealed by the Terrorism Act 2000.

guaranteed access to counsel by the forty-eight hour mark and ordinarily before that time.[15]

Under the European Convention on Human Rights, the United Kingdom's detention of suspected terrorists was, and remains, subject to review by the European Court of Human Rights. In *Brogan and Others v. United Kingdom*, 11 Eur. H.R. Rep. 117 (1988), the court held that the need to conduct an interrogation could not justify a detention of four days and six hours without presentment in court, and the detentions therefore violated Article 5(3) of the European Convention. In response, the United Kingdom entered a "derogation" from Article 5, which the Convention permits when "strictly required by the exigencies of the situation." Such a derogation is itself subject to review by the European Court of Human Rights. In *Brannigan & McBride v. United Kingdom*, 17 Eur. H.R. Rep. 539 (1994), the court upheld the derogation in a case involving delays for interrogation of up to seven days. It did so only after emphasizing that the detentions were excessive by only a few days and that the suspects had access to counsel after no more than forty-eight hours.[16]

The United Kingdom ultimately rejected the PTA's provision for five-day extensions of detentions pursuant to cabinet-level authorization as insufficiently protective of individual rights. In response to a series of independent reviews that reported abuses,[17] Parliament adopted

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[15] *See Brannigan & McBride v. United Kingdom*, 17 Eur. H.R.Rep. 539 ¶ 64 (1994).

[16] *Brannigan*, 17 Eur. H.R.Rep. at ¶¶ 63-64. Subsequently, in *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1996), the court rejected a derogation because the detention at issue was 14 days, which the court deemed "exceptionally long," and was not accompanied by legally guaranteed access to counsel. *Id.* ¶¶ 78, 81.

[17] *See* Lord Shackleton, Report of the Operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976 (1978), summary

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legislative reforms that required enhanced administrative and medical supervision, better documentation, and a code of conduct for interrogators. Yet problems remained, especially the absence of judicial review and other procedural protections. Access to counsel, for example, was restricted; all access could be denied for a period of up to forty-eight hours, and meetings between lawyer and client could be (and were) monitored.[18] Later revelations of wrongful convictions in a number of prominent terrorism prosecutions, such as the "Birmingham Six," the "Guildford Four," and the Judith Ward case,[19] ultimately led to further legislative reforms.

Based on this extensive experience of balancing civil liberties and national security, Parliament enacted its most recent statutes governing the Executive's authority to detain suspected terrorists. The Terrorism Act 2000, c. 11 (U.K.) (the "2000 Act") replaced the PTA and further circumscribed the government's authority to detain suspected terrorists. The 2000 Act prohibits indefinite detention, mandates due process protections for terrorist suspects, and provides for critical oversight by the judiciary. The 2000 Act continues to treat investigations of terrorism as criminal investigations, retains the seven-day limit for detentions, subjects detentions

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available at http://www.bopcris.ac.uk/bop1974/ref4807.html; Earl Jellicoe, Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976 (1983), *available at* http://www.bopcris.ac.uk/img1984/ref3808_1_1.html; Judge H.G. Burnett, QC, Report of the Committees of Inquiry into Police Interrogation Procedures in Northern Ireland (1979), *available at* http://cain.ulst.ac.uk/hmso/bennett.htm.

18 *See* Police and Criminal Evidence Act, 984 (Eng.); Schulhofer, *supra* at 1522-23.

19 *See Birmingham Six: R. v. McIlkenny* [1992] 2 All E.R. 417, C.A. (Crim.); *Guildford Four: R. v. Maguire* [1992] 1 QB 936, C.A. (Crim); *Judith Ward: R. v. Ward* [1993] 1 W.L.R. 619, C.A. (Crim.).

to legislative requirements, and provides the detainee repeated opportunities to respond to the allegations against him.

Without a warrant, police may arrest an individual they "reasonably suspect to be a terrorist," but must release or charge him or her after forty-eight hours unless a court approves an extension of a maximum five additional days.[20] Detainees have a right to notify a designated individual of their detention[21] and to have access to counsel "as soon as is reasonably practicable, privately and at any time."[22]

The 2000 Act also requires a reviewing officer ("an officer who has not been directly involved in the investigation"[23]) to determine whether detention is necessary "as soon as is reasonably practicable" and every twelve hours thereafter during the first forty-eight hours.[24] Before determining whether to authorize continued detention, the reviewing officer must provide a written explanation of the reasons for the extension and an opportunity for the detainee or his counsel to respond.[25] Detention may be continued during the first forty-eight hours only if a reviewing officer determines that further detention is "necessary."[26]

One of the most significant revisions in the 2000 Act is the replacement of absolute executive authority to detain suspects for seven days with judicial review of the application of the police to extend detention beyond the

20 Terrorism Act, 2000, c. 11, § 41(3), Schedule 8, ¶ 29.

21 *Id.* at Schedule 8, ¶ 6.

22 *Id.* at Schedule 8, ¶ 7. The act provides for some discretion for delay limited to forty-eight hours. *See id.* at Schedule 8, ¶ 8.

23 *Id.* at Schedule 8, ¶ 24(1).

24 *Id.* at Schedule 8, ¶ 21(1)-(3). These reviews may be postponed, but only for a limited period and for reasons expressly defined by the legislature. *Id.* at Schedule 8, ¶ 22.

25 *Id.* at ¶ 26(1).

26 *Id.* at Schedule 8, ¶ 23.

initial forty-eight hours.[27] The judicial authority must be satisfied that continued detention is "*necessary* to obtain relevant evidence" and that the investigation is "being conducted diligently and expeditiously."[28] The government must apply for an extension within the initial forty-eight hour period or, at the very latest, within six hours of the end of that period.[29] The detainee is provided notice of the government's application for a five-day extension[30] and is given the opportunity to respond with representation by counsel.[31]

Following the attacks of September 11, 2001, Parliament adopted additional anti-terrorism legislation, the Anti-Terrorism, Crime and Security Act 2001, c.24 (Eng.) (hereinafter ATCSA). The ATCSA affects only one narrow category of detainees, namely foreign nationals whom the government can neither prosecute nor deport. Citizens of the United Kingdom continue to be subject only to the 2000 Act.

The ATCSA addresses both the detention of foreign national terrorist suspects and the protections to which they are entitled.[32] Part Four of the ATCSA expands executive authority to allow the potentially indefinite detention of foreign nationals suspected of involvement with an international terrorist activity or group where neither

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[27] *Compare* PTA, § 7(2) (authorizing extended detention based on approval by the Secretary of State for Northern Ireland) *with* Terrorism Act 2000 ¶ 29 (requiring application to judicial authority to extend detention beyond forty-eight hour period). By providing for judicial review after forty-eight hours, the United Kingdom was able to withdraw its derogation from the European Convention.

[28] *Id.* at ¶ 32(a)-(b) (emphasis added).

[29] *Id.* at ¶ 30(l).

[30] *Id.* at ¶ 31.

[31] ¶ 33(1)(a), (b). Furthermore, the judicial authority must adjourn the hearing if a detainee requests representation by counsel. ¶ 33(2).

[32] *See generally* ATCSA, §§ 21-23.

prosecution nor removal is possible. However, these provisions, which the U.K. government has said are to be used only as a "last resort," are subject to vigorous legislative oversight and judicial review.[33] For example, Part Four of the ATCSA requires the Home Secretary to certify that he reasonably believes that the detainee is an international terrorist and that his presence in the United Kingdom is a risk to national security.[34] Every certification by the Home Secretary is then subject to two levels of review.[35] First, a detainee may appeal to the Special Immigration Appeals Commission (SIAC), a superior court of record composed of at least three members and led by a judge. If the SIAC finds no reasonable grounds for the Home Secretary's belief that the person is a suspected terrorist or poses a threat to national security, it must cancel the certificate.[36] Second, if the SIAC decides not to cancel

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[33] Privy Counsellor Review Committee, 2003, Anti-terrorism, Crime and Security Act 2001 Review: Report, H.C. 100 50 (Dec. 18, 2003) (hereinafter Newton Comm. Report).

[34] §§ 21-23.

[35] Special Immigration Appeals Commission Act, 1997, c. 68 (Eng.), as amended by ATCSA, § 35. In such an appeal, the detainee has the right to legal representation. The hearings are generally open to the detainee and his counsel, but even where security considerations require that a portion of a hearing be closed, an independent "special advocate" is present to represent the interests of the detainee. At closed hearings, the special advocate reviews sensitive material *in camera*, makes submissions to the SIAC, and cross-examines witnesses. Special Immigration Appeals Commission (Procedure) Rules (2003), Rule 37; Rule 35.

[36] *Id.* at § 25. In a case decided last month (March 2004), the Court of Appeals affirmed the SIAC's cancellation of an executive certificate of detention. *See Sect'y of State for the Home Dep't. v. M*, [2004] All E.R. 367 (C.A.) (Mar. 18, 2004). While recognizing the wide latitude that the Home Secretary necessarily enjoys under the ATCSA, the court stated:

> While the need for society to protect itself against acts of terrorism is self evident, it remains of the greatest importance

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the certificate, the detainee may appeal that decision to the Court of Appeals, and thereafter to the House of Lords.

Even with the procedural protections imposed by Parliament, the ATCSA's provisions for indefinite detention of non-national terrorist suspects were criticized for requiring the United Kingdom to derogate from the European Convention for the Protection of Human Rights and Fundamental Freedoms.[37] In response to this criticism, Parliament conditioned executive authority to detain foreign nationals under the ATCSA on annual renewal of legislative approval by inserting an annual sunset provision.[38]

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> that, in a society which upholds the rule of law, if a person is detained as 'M' was detained, that individual should have access to an independent tribunal or court which can adjudicate upon the question of whether the detention is lawful or not. If it is not lawful, then he has to be released.

Id. at ¶ 34(iii).

[37] The U.K. Government has acknowledged that the power to detain indefinitely under § 23 of Part IV of the ATCSA derogates from the right of liberty contained in Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The U.K. government declared a public emergency and notified the Council of Europe of a derogation from Article 5 of the ECHR. *See* Explanatory Notes to the Anti-terrorism, Crime and Security Act, 2001, c. 24, ¶¶ 73-76 (U.K.). *Amici* note that the United Kingdom and Turkey are the only members of the Council of Europe that have chosen to derogate from its obligations under Article 5 of the European Convention.

[38] *See* § 29 of Part IV of ATCSA. The indefinite detention provisions (§§ 21-23) will permanently expire on November 10, 2006. *See* § 29(7). *Amici* note that several aspects of the detention procedures under Part 4 are presently subject of litigation. The distinction drawn between citizens and non-citizens under the ATCSA was held unlawfully discriminatory by the SIAC, but this decision was reversed by the Court of Appeal. *See A. v. Sect'y of State for Home Dep't*, [2002] EWCA Civ. 1502, [2003] 2 W.L.R. 564 C.A. (Civ). The House of Lords granted leave to appeal. *See* [2003] 1 W.L.R. 1994 H.L. In the same proceedings, the House of Lords is considering whether the derogation from Article 5 of the European Convention on Human Rights to permit

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The ATCSA further mandates that the Secretary of State appoint a person to review the statute in practice and that a Privy Council committee comprehensively review the ATCSA within two years after its enactment.[39] This Privy Council Review Committee expressed grave concerns about the principle, efficacy, and practice of indefinite detention and strongly recommended "that the Part 4 powers which allow foreign nationals to be detained potentially indefinitely . . . be replaced as a matter of urgency."[40]

In sum, the choices made by the United Kingdom through long experience contrast sharply with Petitioner's pursuit of an incommunicado detention standard for the United States.

2. Israel

Although Israel has faced, and vigorously fought, terrorism since its founding in 1948, it has done so without resorting to the measures Petitioner claims are necessary in

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indefinite detention is unlawful on other grounds. *Amici* take no position concerning this pending litigation. *Amici* include this discussion of the ATCSA only to emphasize that even after September 11, Parliament has not authorized the government to subject individuals to indefinite incommunicado detention without some opportunity to be heard.

[39] ATCSA, §§ 28, 122. Lord Carlile of Berriew QC was appointed by the Secretary of State to assess the statute in practice and submitted a report last February. *See* Lord Carlile of Berriew, QC, Anti-Terrorism Crime and Security Act 2001, Part IV, Section 28 Review 2003 (2004). Among other things, Lord Carlile reported that the government generally had not abused its Part 4 authority, but also noted that grounds for detention for short periods of time "may be insufficient for indefinite detention." *Id.* at 9.

[40] Newton Comm. Report at 56. This Report recommended that new legislation deal similarly with all terrorists, regardless of nationality, and not require a derogation from the European Convention on Human Rights. *Id.* at 56. *See also* Joint Committee on Human Rights, Anti-Terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4, at 16 (hereinafter "Joint Committee Report")

the United States. Like the United Kingdom, Israel regulates detention legislatively, imposes time constraints on detention (although Israel does not limit the number of times detention may be renewed with judicial approval), allows detainees access to counsel, and affords detainees judicial review. [41]

Terrorist violence against Israel, always a concern, escalated after the 1967 war. In the late 1960s and throughout the 1970s, terrorist organizations conducted a series of devastating attacks in Israel. In the 1980s, terrorists launched attacks against Israel from Lebanon. Beginning in December 1987, Israel faced the first intifada and violent demonstrations in the Gaza Strip designed to force the Israeli military from the West Bank and Gaza and to establish an independent Palestinian state.[42]

During the second intifada, beginning in September 2000, terrorist violence intensified, with well over eight hundred attacks on Israel to date. Between September 2000 and June 2003, 243 Israelis were killed and more than 1400 wounded in a nation of about six million as a result of terrorist suicide bombings by Hamas organizations alone.[43] Although Israel has responded vigorously to this ongoing threat within its borders, it has continued to recognize the fundamental constraints that Petitioner asks this Court to ignore.

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[41] This discussion pertains to detention within the State of Israel. Discussion of detention in the West Bank and Gaza follows, *infra* at 26-27.

[42] *See, generally*, Israel Ministry of Foreign Affairs, History – The State of Israel *at* www.israel-mfa.gov.il/mfa/history/history%20of%20Israel.

[43] *See* Israel Ministry of Foreign Affairs, *Summary of Terrorist Attacks Recently Thwarted by Security Services, at* http://www.mfa.gov.il/MFA/Government/Communiques/2003/Summary+of+Terror+Attacks+Recently+Thwarted+by+Sec.htm (last modified June 11, 2003).

Israel inherited laws and procedures for administrative detention from those established during the time of the British Mandate for Palestine (1922-48). After statehood, Israel codified the pre-1948 laws through the Law and Administrative Ordinance of 1948.[44] It later reformed its detention law to provide both for access to counsel and judicial review in the Emergency Powers (Detention) Law of 1979 (the "Detention Law").[45]

Israeli law mandates that detention must be pursuant to specific legislative authorization "and to an extent no greater than required."[46] The Detention Law continues to regulate detention within Israel. It confers authority on the Minister of Defense to detain both Israeli citizens and non-citizens within Israel if he finds "reasonable cause to believe that reasons of state security or public security" require detention.[47]

The law is replete with procedural protections. It provides that a detainee is not only entitled to access to counsel[48] but also must be brought before the President of the District Court in the jurisdiction of arrest within forty-

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[44] Law and Administration Ordinance, § 11, 1948, 1 L.S.I. 7 (1948).

[45] Emergency Powers (Detention) Law 1979, 33 L.S.I. 89 (1978-79). Although this statute applies only in an official state of emergency, Israel has been in such a state since its founding in 1948.

[46] Basic Law: Human Dignity and Liberty, 1992, *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm ("There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise ... except by a law benefiting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than required." *Id.* §§ 5, 8); *see also* A.D.A. 7/94, *Ben Yoseph v. State of Israel* (given Sept. 1, 1994), ¶ 3 (affirming requirement of legislative authorization for administrative detention).

[47] *Id.* § 2(a).

[48] However, a detainee's counsel can be restricted to members of the bar "authorized . . . to act as military defense counsel." *Id.* § 8(b).

eight hours of detention.[49] The District Court's review is essentially *de novo*. It is required to exercise its own independent discretion in reviewing the suitability of the detention order.[50] The court must vacate the detention order if it does not find "objective reasons of state security or public security" that require the detention or if the detention "was made in bad faith or from irrelevant considerations."[51] A detainee may appeal the District Court's decision directly to the Supreme Court of Israel.[52]

In addition to the initial hearing, the District Court must review the detention order within three months.[53] The Minister of Defense may extend the detention order for a period of up to six months.[54] While consecutive extensions are permitted, judicial review is required at least every three months.[55] Detainees also have the right to counsel and to be present at these review hearings, although, as with the initial hearing, evidence may be sealed for security reasons.[56]

In addition to the District Courts, the Supreme Court of Israel has taken an active role in reviewing detention authority.[57] The court has been attentive to the human rights

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[49] *Id.* § 4(a). In the Israeli judiciary, the five District Courts sit above the Magistrates' Courts and below the Supreme Court. Detention cases are included in a category of important cases for which the District Court has original jurisdiction and the Supreme Court has appellate jurisdiction. *See* Basic Law: Judicature, 1984, 38 L.S.I. 101 (1983-84).

[50] Baruch Bracha, *Checks and Balances in a Protracted State of Emergency—The Case of Israel*, 33 Isr. Y.B. Hum. Rts. 123, 148 (2003).

[51] Detention Law, § 4(c), 1979, 33 L.S.I. 89.

[52] *Id.* § 7(a).

[53] *Id.* § 5.

[54] *Id.* § 2(b).

[55] *Id.* § 5.

[56] *Id.* § 8(a), 6(c).

[57] *See* Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to*
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concerns raised by administrative detention, especially after the Knesset enacted the Basic Law: Human Dignity and Liberty, in 1992.[58] For example, the court has noted that administrative detention is a severe and unusual measure which is difficult to reconcile with democratic values and therefore should be resorted to only if less restrictive means would not suffice.[59]

Exercising active judicial review, the Supreme Court held in 1999 that the 1979 law does not confer authority to detain persons who are not themselves terrorist threats as "bargaining chips."[60] In response, the Knesset enacted the 2002 Incarceration of Unlawful Combatants Law.[61] This law extends the power of detention to members of a force perpetrating hostile acts against Israel even without a showing of actual or threatened personal involvement in such acts.[62] So far as *amici* have been able to determine, this law has not been used since its application in the case that inspired it, which involved a potential prisoner exchange with Lebanon.

In any case, the law provides for access to counsel and judicial review. A detainee under the statute must be brought before a District Court judge within fourteen days of

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Hold Terrorists as Bargaining Chips?, 18 Ariz. J. Int'l & Comp. Law 721, 758 (2001).

[58] Basic Law: Human Dignity and Liberty, 1992, *available at* http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

[59] A.D.A. 7/94, *Ben Yoseph v. State of Israel* (given Sept. 1, 1994), ¶ 3.

[60] Further Hearing [F.H.] 7048197, *Plonim v. Minister of Defense*, 54(1) P.D. 721 (original in Hebrew; summarized in English *in* 30 Isr. Y.B. Hum. Rts. 340 (2000)).

[61] Incarceration of Unlawful Combatants Law, 2002, *available at* http://www.justice.gov.il/NR/rdonlyres/7E86D098-0463-4F37-A38D-8AEBE770BDE6/ 0/IncarcerationLawedited140302.doc (last visited Apr. 9, 2004).

[62] *Id.* § 2.

incarceration to determine the appropriateness of the detention, and may appeal that decision to the Supreme Court.[63] The statute directs that a detainee must have the opportunity to meet with a lawyer "at the earliest possible date that meets State security requirements," but in any case no later than seven days after the detention order is approved.[64] Like the 1979 Detention Law, the 2002 Unlawful Combatants Law provides for administrative detention orders that are legislatively authorized, that are initially limited in time but renewable upon a proper showing to a judge, and that are subject to judicial review with access to counsel.[65]

The West Bank and Gaza. The West Bank and Gaza lie outside the borders of the State of Israel and are therefore subject to the laws of war rather than legislative enactments governing domestic detention. Even so, the detention regime employed by Israel in the West Bank and Gaza provides robust judicial review. Israel's "Basic Law: Judicature," vests the Supreme Court of Israel with authority over detention in the West Bank and Gaza.[66] Acting as the High Court of Justice, the court may "hear matters in which it

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[63] *Id.* §§ 5(a), 5(d).

[64] *Id.* § 6(a). As with the 1979 law, counsel may be limited to those authorized to appear before the military courts. *Id.* at § 6(b).

[65] Following the initial hearing, the detention must be reviewed by the District Court at least every six months, in contrast to every three months under the 1979 law. *Id.* § 5(c). The detainee can be held until the Minister of Defense determines that the group with which the detainee is associated has ceased hostilities against Israel or until a court determines that the detainee's release would not threaten state security. *Id.* § 8. At detention hearings the Minister of Defense is entitled to a presumption in favor of his determination. *Id.* § 7.

[66] Basic Law: Judicature § 15(c) (vesting the Supreme Court of Israel with jurisdiction as the final court of appeals in cases involving domestic law, and as a High Court of Justice, which is a court of first instance, in cases arising from detention orders in the West Bank and Gaza).

deems it necessary to grant relief for the sake of justice."[67] Detainees have a right to appeal military law and orders directly to the High Court of Justice.[68]

In its capacity as the High Court of Justice, the court has recognized that the detainees' right of appeal carries with it a guarantee of due process. For example, when -- like Petitioner in this case -- the military asserted that extended incommunicado detention was necessary to permit interrogation of suspected terrorists, the Supreme Court rejected the military's assertion of unilateral authority to curtail individual rights without prompt judicial review. In 2002, in *Marab v. IDF Commander in the West Bank*, the court reviewed a military order that authorized the detention of Palestinians for up to twelve days before judicial review. Rejecting the military's claim that a need for effective interrogation justified this practice, the court held that a twelve-day period without judicial review "unlawfully infringe[d] upon the judge's authority, thus infringing upon the detainee's liberty, which the International and Israeli frameworks are intended to protect."[69] The court also recognized the right of a detainee "to be visited by the Red Cross" and to have his family "informed of his whereabouts."[70] Thus, even in the West Bank and Gaza, and at a time of intense terrorist activity, the judiciary has subjected detention practices to careful scrutiny to guarantee basic human rights and has limited the military's ability to detain suspects indefinitely and incommunicado.

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[67] *Id.*

[68] *See, e.g.*, H.C.J. 3239/02, *Marab v. IDF Commander*, 57 (2) P.D. 349 (Heb.) (reviewing the detention of Palestinians by the military).

[69] *Id.* ¶ 35.

[70] *Id.* ¶ 46. In *Marab*, the court also upheld the order's provision allowing detention without access to counsel for four days with extensions available for up to 32 days.

III. THE U.S. DEPARTMENT OF STATE CONDEMNS OTHER COUNTRIES' DETENTION OF SUSPECTS INDEFINITELY AND INCOMMUNICADO AS A VIOLATION OF FUNDAMENTAL HUMAN RIGHTS.

When other governments have detained persons in ways that resemble the detainment of Mr. Padilla, the U.S. government consistently has condemned those practices as human rights violations. Each year the State Department submits to Congress a report "Country Reports on Human Rights Practices" describing human rights in most countries of the world.[71] By holding a U.S. citizen in prolonged, incommunicado detention without charge, Petitioner has placed the United States in the company of regimes the United States itself has identified as abusers of human rights.

The State Department has recently condemned North Korea for such abuses.[72] In Iran, the State Department found that "[c]ontinuing serious abuses included" were similar.[73] And the State Department condemned Saddam Hussein's

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[71] These annual reports are submitted pursuant to § 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as amended, and § 504 of the Trade Act of 1974, as amended. These statutes require that the Secretary of State submit reports to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate on countries that receive foreign aid from the United States specifically as well as those that are members of the United Nations more generally. The reports are released annually by the Bureau of Democracy, Human Rights, and Labor. *See* Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Country Reports on Human Rights Practices for 2003 (2004) (hereinafter 2003 Human Rights Reports) *available at* http://www.state.gov/g/drl/rls/.

[72] *See* 2003 Human Rights Report for North Korea, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27775.htm ("There are no practical restrictions on the ability of the Government to detain and imprison persons at will and to hold them incommunicado.").

[73] 2003 Human Rights Report for Iran, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27927.htm.

Iraq for "detention, often for long periods of time, without access to a lawyer or the courts."[74] In many countries with "poor" or even "extremely poor" records, the length of detention has been shorter than the detention at issue here.[75]

Countries that do not permit detainees to meet with counsel or family members receive similar criticism. For instance, the Governments of Burma, Cambodia, China and Malaysia were all rebuked for denying their detainees access to counsel, and the State Department particularly criticized the judiciary's acceptance of the Malaysia's assertion that access to counsel could be denied because it would interfere with an ongoing investigation.[76] Ecuador was criticized for allowing detainees without lawyers to wait as long as a year before being tried or released.[77] Likewise, Saudi Arabia was criticized for allowing detainees "only limited contact with

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[74] 2003 Human Rights Report for Iraq, *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27928.htm. According to Petitioner, the interim Constitution of Iraq provides "the right to a fair, speedy and open trial . . . [and] prohibits . . . arbitrary arrest and detention." Donald H. Rumsfeld, *The Price of Freedom in Iraq*, N.Y. Times, March 19, 2004 at A23.

[75] *See* 2003 Human Rights Reports on Bangladesh, Belarus, Ethiopia, Macedonia, Mexico, Morocco, Nigeria. Even in countries where incommunicado detention is limited, usually to days, the State Department has nevertheless identified these detentions as human rights issues. *See, e.g.*, 2003 Human Rights Reports on Egypt, Fiji, Morocco, Oman, Peru, *available at* http://www.state.gov/g/drl/rls/hrrept/2003/index.htm.

[76] *See* 2003 Human Rights Report for Burma *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27765.htm; 2003 Human Rights Report for Cambodia, *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27766.htm; 2003 Human Rights Report for China, *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27768.htm, 2003 Human Rights Report for Malaysia, *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27778.htm.

[77] 2002 Human Rights Report for Ecuador *at* http://www.state.gov/g/drl/rls/hrrpt/2002/18330.htm.

their families or lawyers,"[78] and similar concerns were raised about the manner in which the Oman treats its detainees.[79]

The United States has identified markers of progress, while remaining quick to point out inadequacies in enforcement.[80] These examples all make the same point: lengthy incommunicado detention is a universally recognized human rights violation, widely practiced by authoritarian regimes and consistently condemned by the United States citing the international law of human rights.

CONCLUSION

For these reasons, *amici* respectfully urge this Court to affirm the judgment of the Court of Appeals.

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[78] 2002 Human Rights Report for Saudi Arabia, *at* http://www.state.gov/g/drl/rls/hrrpt/2002/18288.htm.

[79] 2002 Human Rights Report for Oman, *at* http://www.state.gov/g/drl/rls/hrrpt/2002/18285.htm.

[80] *See, e.g.*, 2003 Human Rights Report for India *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27947.htm ("The Prevention of Terrorism Act (POTA), enacted in March 2002 allows detention without charge for 3 months, and 3 more months if allowed by a special judge"); 2003 Human Rights Report for Pakistan, *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27950.htm (maximum detention period of 90 days but instances reported of imprisonment without charge for as much as 6 months); 2003 Human Rights Report for Morocco, *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27934.htm (12-day maximum detention period in terrorism cases, with the government criticized for having denied access to counsel or family members initial detention period); 2003 Human Rights Report for Algeria *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm (12-day detention permitted when there is a state of emergency); 2003 Human Rights Report for Turkey *at* http://www.state.gov/g/drl/rls/hrrpt/2003/27869.htm (maximum detention period of seven days).

[81] Counsel acknowledge with thanks the assistance of the students in the Allard K. Lowenstein International Human Rights Clinic at the Yale Law School in the preparation of this brief.

SUMMARY OF DETENTION LEGISLATION FOR CITIZENS OF U.S. DEMOCRATIC ALLIES

Country	**Australia**
Legislative Authority	Yes. Australian Security Intelligence Organisation Act 1979, No. 113 (1979) (Austl.), *amended to include anti-terrorism provisions by* Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003, No. 77 (2003), amend. 24 (Austl.) [hereinafter ASIO].
Access to Counsel	Yes. Subject to limited judicially imposed conditions to enable some interrogation.[1]
Detention Period	Detention capped at 168 hours[2] with total hours of interrogation limited to 24.[3]
Judicial Review	Yes. Judge must first authorize detention or interrogation, and such authorization must be periodically reviewed and reissued.[4] During each 24-hour period in which questioning occurs, detainee must be informed that he can seek remedy to detention and treatment in

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[1] ASIO § 34C(3B).

[2] *Id.* § 34C(4)(3)(c).

[3] *Id.* § 34HA(6),(7).

[4] *Id.* § 34C(1)-(6).

[5] *Id.* § 34DA(3).

Country	Australia
	federal court.[5]

Country	Canada
Legislative Authority	Yes. Legislative provisions embodied in criminal code: Criminal Code, R.S.C. 1985, c. C-46 §§ 83.29-83.3 (Can.), *amended by* Anti-Terrorism Act 2001, Ch. 41 (Can.).
Access to Counsel	Yes. Upon arrest or detention.[6]
Detention Period	Detainee must be brought before a judge within 24 hours, or as soon as one becomes available.[7] Detention must cease within 48 hours of that judicial hearing.[8]
Judicial Review	Yes. Judicial authorization of order to detain for the purposes of an investigative hearing;[9] detainee brought before judge upon arrest;[10] review of detention within 24 hours of arrest or as soon as judge becomes available.[11]

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[6] Criminal Code, R.S.C. 1985, ch. C-46, § 83.3.

[7] *Id.* § 83.3(6).

[8] *Id.* § 83.3(7)-(9).

[9] *Id.* § 83.28(4)(7)(9).

[10] *Id.* § 83.29(3).

[11] *Id.* § 83.3(6).

Country	France
Legislative Authority	Yes. Legislative provisions embodied in criminal code and code of criminal procedure. Most recent statute: C. PR. PÉN., arts. 63, 63-4, 706-73, 706-88 (Fr.), *last modified by* Law No. 2004-204 of Mar. 9, 2004, J.O. Mar. 10, p. 4567.
Access to Counsel	Yes. After 72 hours of detention.[12]
Detention Period	Initial detention of maximum 48 hours.[13] For alleged terrorists, the detention may be extended for two additional 24-hour periods with written authorization from a judge for a total of 96 hours.[14]
Judicial Review	Yes. Authorization of detention by a procureur within 24 hours.[15] Extensions of detention beyond 48 hours authorized by judge.[16]

[12] C. PR. PÉN. arts. 63-4, 706-88 (Fr.).

[13] *Id.* art. 63.

[14] *Id.* arts. 706-88.

[15] *Id.* art. 63.

[16] *Id.* arts. 706-88.

Country	Germany
Legislative Authority	Yes. Legislative provisions embodied in criminal code: Criminal Procedure Code §§ 112 *et seq.* StPO (F.R.G.).
Access to Counsel	Yes. Informed at time of arrest of right to counsel throughout the proceedings.[17] Right to court-appointed counsel.[18]
Detention Period	Detention without warrant: 24 hours.[19] Judge may order pre-trial investigative detention without bail.[20] Such detention may not exceed 6 months without approval by a higher court.[21]
Judicial Review	Yes. Detainee must be brought before a judge

[17] §§ 136 Nr. 1, 137 StPO (F.R.G.).

[18] *Id.* § 117 Nr. 4.

[19] *Id.* §§ 128, 135.

[20] *Id.* §§ 112, 114.

[21] *Id.* § 121.

[22] *Id.* §§ 115, 115(a).

[23] *Id.* § 117 Nr. 1.

Country	Germany
	within 24 hours.[22] Detainees have the right to challenge their detention,[23] and a right to attend and participate in that challenge.[24]

(footnote continued from previous page)
[24] *Id.* § 118a Nrs. 2-3.

Country	Israel
Legislative Authority	Yes. Emergency Powers (Detention) Law, 1979, 33 L.S.I. 89 (1978-79) (Isr.). Incarceration of Unlawful Combatants Law, 2002 (Isr.).
Access to Counsel	Yes. Under the 2002 Unlawful Combatants Law, counsel must be provided within 7 days (but no later than 7 days prior to hearing).[25] The 1979 Detention Law does not specify at what point detainee may have access to counsel, but indicates that detainee has right to counsel at all review proceedings.[26]
Detention Period	6 months, but may be renewed. Renewal requires judicial approval based on court's independent exercise of discretion. No limit on number of renewals.[27]
Judicial Review	Yes. Under the 1979 Detention Law, within 48 hours, the detainee must be brought before the

[25] Incarceration of Unlawful Combatants Law, § 6(b).

[26] Emergency Powers (Detention) Law, § 8(a) (referring to "right to counsel" during all review proceedings, although counsel may be limited to members of bar "authorized . . .to act as military defence counsel in courts martial.").

[27] Emergency Powers (Detention) Law, § 2(b); Incarceration of Unlawful Combatants Law, § 5(c).

Country	Israel
	President of the District Court to confirm, set aside, or shorten the length of detention.[28] An additional review must take place within 3 months.[29] Within 6 months, the Minister of Defense may renew the detention order or the detainee must be released. If the detention order is renewed, judicial review must occur again at 48 hours and within 3 months. The Minister of Defense may renew the detention order indefinitely.[30] The detainee can appeal to the Supreme Court.[31] Under 2002 Incarceration of Unlawful Combatants, within 14 days, the prisoner must be brought before a judge of the District Court, who may uphold or quash the detention order. Within 30 days of the District Court hearing, the detainee can appeal to Supreme Court. At 6 months, detainee must be brought before a judge of the District Court, who must order the detainee's release if he finds that such release will not harm state security. Within 30 days of the review hearing, the

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(footnote continued from previous page)

[28] Emergency Powers (Detention) Law, § 4(a).

[29] *Id.* § 5

[30] *Id.* § 2(b).

[31] *Id.* § 7(a).

[32] Incarceration of Unlawful Combatants Law, § 5.

Country	Israel
	detainee may appeal to the Supreme Court.[32]

Country	Spain
Legislative Authority	Yes. Legislative provisions embodied in criminal code: Constitución Española [C.E.] art. 17 (Spain); L.E. CRIM. arts. 384, 489, *et seq.*, *last modified by* Law on Management of the State (B.O.E., 2003, 41842).
Access to Counsel	Yes. Court appointed counsel.[33]
Detention Period	Constitutional limit of 72 hours on detention without charge,[34] which can be extended by 48 hours based on judicial discretion.[35] After charging the detainee, there is a two-year limit on detention, unless a judge grants a two-year extension.[36] No detainee may be held for more than four years without being brought to

[33] C.E. art. 17(3); *see also* L.E.CRIM. art. 384.

[34] C.E. art. 17(2).

[35] L.E. CRIM. art. 496.

[36] *Id.* art. 504.

[37] *Id.*

Country	Spain
	trial.[37]
Judicial Review	Yes. Within 120 hours, a detainee must be brought before a judge. Extensions of detention require judicial authorization.[38]

[38] C.E. art. 17(4); L.E.CRIM. arts. 496, 504.

Country	United Kingdom
Legislative Authority	Yes. Terrorism Act, 2000, c.11, ¶ 41, sched. 8 (U.K..).
Access to Counsel	Yes. As soon as "reasonably practical,"[39] and "at any time" within 48 hours.[40]
Detention Period	Initial 48 hours in detention.[41] May be extended for another five days with judicial authorization.[42]
Judicial Review	Yes. Review of detention by independent "review officer," as soon as "reasonably practical," within 48 hours. After initial 48 hours, judicial authorization of extension required.[43]

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[39] Terrorism Act, 2000, c.11, ¶ 7(1), sched. 8 (U.K.).

[40] *Id.* ¶ 7(2), sched. 8 (U.K.).

[41] *Id.* ¶ 41.

[42] *Id.* ¶ 36.

[43] *Id.* ¶¶ 29, 36.